

injury claim alleging that on August 5, 1989 he injured his back while in the performance of duty. By letter dated January 23, 1990, the Office accepted the claim for subluxation and lumbosacral sprain with lumbosacral radiculitis. Appellant retired on June 20, 2001.

On December 31, 2001 appellant filed a claim for a schedule award. In a November 1, 2001 report, Dr. Rudolph Merick, a Board-certified internist, opined that appellant had an 8 percent impairment of the right lower extremity and a 12 percent impairment of the left lower extremity. Dr. Merick also found that appellant had a five percent sexual dysfunction impairment. The Office referred appellant to Dr. Edward Williamson, a Board-certified neurologist, for a second opinion. In a report dated July 9, 2002, Dr. Williamson found that appellant had completely recovered from the accepted injury. He found no evidence of radiculopathy or nerve damage and no need for additional treatment. By decision dated September 18, 2002, the Office denied appellant's claim for a schedule award. In a decision dated March 3, 2003, the hearing representative affirmed the September 18, 2002 decision. In a decision dated October 1, 2003, the Board determined that the case was not in posture for decision, finding a conflict in medical opinion between Dr. Williamson and Dr. Merick with regard to whether appellant had any impairment based on his work-related injury. The case was remanded for the Office to refer appellant to an impartial medical specialist.²

By letter dated November 26, 2003, the Office referred appellant to Dr. Jack P. Fallia, a Board-certified orthopedic surgeon, for an impartial medical examination. He reviewed appellant's medical records and conducted a physical examination. In a medical report dated January 22, 2004, Dr. Fallia stated:

“At the present time, in my opinion and according to the [A.M.A., *Guides*] fifth edition, chapter 15, point [4], under lumbar spine, I believe with a reasonable degree of medical certainty that [appellant] falls in the category of [diagnosis-related estimate] lumbar category [2] and lumbar category [3]. This would place a range of disability from 5 [percent] to 13 [percent]. Because of his symptoms, which include verifiable radicular complaints and as documented by [magnetic resonance imaging] [scan], although he has not been operated on, he would fall somewhere in the category between 5 [percent] and 13 [percent] and I believe a fair assessment in this category would be at 10 [percent] in that he has not had surgery and is still intermittently symptomatic, but not totally incapacitated.”

On April 13, 2004 the Office referred the report of Dr. Fallia to an Office medical adviser. In a note dated April 19, 2004, the Office medical adviser indicated that Dr. Fallia did not follow the A.M.A., *Guides*. He found that pursuant to Table 15-15 appellant was entitled to a Grade 4 deficit or a sensory deficit of 25 percent. The Office medical adviser noted that, pursuant to Table 15-18, the maximum amount appellant was entitled to was five percent. He concluded that appellant had a one percent impairment of the left lower extremity.

By decision dated April 27, 2004, the Office determined that appellant was entitled to a schedule award based on a one percent permanent impairment of the left lower extremity.

² *Id.*

On April 30, 2004 appellant requested an oral hearing. On March 15, 2005 the Office hearing representative denied counsel's request to postpone the hearing and noted that he would review the case on the written record.

Appellant submitted medical reports by Dr. Robert Love Baker, II, an osteopath, dated May 13, June 28 and August 18, 2004. Dr. Baker opined:

“[A]ccording to Table 15/15 [appellant] has a [G]rade 2 with 61 [to] 80 [percent] sensory deficit of the lower extremities and Table 15/16 shows that he has a [G]rade 4 for 1 [to] 25 [percent] motor deficit of the left greater than the right leg. The Table 15/18 shows he has 5 [percent] loss of function due to sensory abnormality up to 37 [percent] loss of function due to the strength in the lower extremities. Again, in combining all three considerations, I have placed [appellant's] disability at 10 [percent] loss as determined by the [f]ifth [e]dition of the [A.M.A., *Guides*]. By decision dated October 25, 2005, the hearing representative found that Dr. Baker's opinions required further development of the record, specifically referral to an Office medical adviser for review.

In a report dated February 8, 2006, the Office medical adviser stated:

“I have reviewed the original [Office medical adviser] notes regarding a [one percent] decision for [appellant]. I do not know what physical examination findings the [Office medical adviser's] recommendations are based upon [but] I am going to assume it was from Dr. Fallia's report of [January 22, 2004] where it was noted that [appellant's] “motor and sensory examination is normal, although there is a question of some decreased sensation with pinprick over the S1 distribution on the left.” Based upon the information presented I agree with the [one percent] [l]eft [l]ower [e]xtremity impairment rating by the [Office medical adviser] as it support by physical examination findings. (Emphasis in the original.)

“I reviewed Dr. Baker's note of [June 28, 2004]. Dr. Baker provided an impairment rating for a spinal nerve. He did not identify which spinal nerve this was. I will assume that this nerve is the L5 nerve because the impairment values used by Dr. Baker match L5 impairment rating values per the A.M.A., *Guides*. Dr. Baker did not provide physical examination finding to support his rating exam. I applied the grades of sensory and motor deficits for the L5 nerve root and found that the impairment rating was 13 [percent] lower extremity impairment, not the 10 [percent] lower extremity impairment calculated by Dr. Baker. Based upon the lack of physical examination findings and the incorrect calculations I cannot support the 10 [percent] lower extremity impairment which Dr. Baker applied.”

By decision dated February 13, 2006, the Office determined that appellant did not have more than a one percent impairment of his left lower extremity, for which he had been previously awarded.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act³ and its implementing regulation⁴ sets forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁵

Section 8123(a) of the Act provides in pertinent part: If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁶ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.⁷

In a situation where the Office secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.⁸

ANALYSIS

The Office accepted that appellant sustained subluxation and lumbosacral sprain with lumbosacral radiculitis. A conflict was found between the opinions of appellant's treating physician, Dr. Merick, and the second opinion physician, Dr. Williamson, with regard to whether appellant had any impairment to his left lower extremity. The Office referred appellant to Dr. Fallia for an impartial medical examination. Dr. Fallia discussed appellant's condition pursuant to the A.M.A., *Guides*. However, he did not refer to specific page number, charts or tables for his impairment rating. It appears that he is addressing appellant's impairment in conjunction with whole person impairment. A schedule award is not payable under the Act for impairment of the whole person.⁹ Accordingly, due to these deficiencies in the report of the

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ *Id.*

⁶ 5 U.S.C. § 8123(a).

⁷ *Williams C. Bush*, 40 ECAB 1064, 1975 (1989).

⁸ *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232, 238 (1988); *Harold Travis*, 30 ECAB 1071, 1078 (1979).

⁹ *Gordon G. McNeill*, 42 ECAB 140, 145 (1990).

impartial medical examiner, his report did not establish appellant's degree of impairment under the Act. At this point, the Office should have requested that Dr. Fallia submit a supplemental report to address the deficiencies.¹⁰

For these reasons, Dr. Fallia's opinion is in need of clarification and elaboration. In order to resolve the conflict in the medical opinion, the case will be remanded to the Office for further medical development. Dr. Fallia should be requested to supplement his opinion or permanent impairment. If Dr. Fallia is unable to clarify his opinion or if his supplemental report is vague, speculative or lacking in rationale, the Office should submit the case to a second impartial specialist. After such further development as the Office deems necessary, an appropriate decision should be issued regarding the extent of appellant's impairment to his left lower extremity.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 13, 2006 and October 25, 2005 are vacated and this case is remanded for further consideration consistent with this decision.

Issued: November 13, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹⁰ *Nancy Lackner, supra* note 8.